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SUBJECT: THE PROPOSED EU CONSTITUTION: WHAT IT COULD MEAN
FOR THE U.S.

REF: USEU BRUSSELS 1556

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SUMMARY

¶1. (SBU) The Constitutional Treaty signed last October requires ratification by all 25 Member States. It faces its first serious test in the May 29 French referendum, and a second critical vote in the Netherlands on June 1. Under those circumstances, entry into force is a distant and uncertain goal. But even if this text does not enter into force, the proposed Constitution represents an important signpost of the EU's ambitions and intentions over the coming years, and one that all 25 member state prime ministers and presidents were willing to endorse and sign last October in Rome. Rejection of this text does not mean these proposals will disappear.

¶2. (SBU) Furthermore, the Constitutional Treaty could have a profound impact on how the USG deals with the EU. Several of the changes, particularly those improving the EU's institutional efficiency, should simplify our relations. These include creation of a longer-term (two-and-a-half years) President of the European Council who holds no national office, as well as an EU "Foreign Minister" responsible for both foreign policy formulation and implementation -- a job currently shared between two individuals. A unified EU foreign service would also make the EU delegations in capitals around the world more authoritative interlocutors for us on EU policies than the current Commission delegations. The Constitution would increase, at least at the political level, the EU's commitments to "solidarity" and mutual defense via both civil and military crisis response. And it should give a boost to the EU's efforts to improve military capabilities. The EU's legislative procedures would also be simplified, and somewhat easier to understand -- although we are not persuaded they will necessarily make it easier to pass EU legislation.

¶3. (SBU) For a host of other changes, the impact on the EU's functioning, and on US interests, is difficult to predict. Much will depend on how they are implemented, and in some cases, how they are interpreted by the EU's courts. These include increased legislative powers for the European Parliament (EP), particularly in justice and home affairs (JHA) and on the EU's budget; establishment of a single legal personality for the Union (which some fear could constrain individual member states ability to reach bilateral agreements); conversion of the EU's Charter of Fundamental Rights from a political document to a legally binding one; and mechanisms that would allow for (but not require) further integration in foreign affairs, security and economic areas.
END SUMMARY.

¶4. (U) This is the second of two messages on the Constitution. This message discusses the possible implications for the USG of the new treaty. Reftel addresses the implications for European integration and relations with the U.S. should one or more countries reject the document.

GREAT DOORSTOP

¶5. (U) The Constitutional Treaty merges and modifies the EU's basic treaties into a single text. The resulting document is an extremely complex one of four hundred forty-eight Articles, with thirty-six Protocols and fifty Declarations attached, making the English language version in the EU's Official Journal weigh in at four hundred seventy-four pages.

To help our readers better understand its meaning through American eyes, we offer the following highlights on how the new Treaty, if adopted, could change how the EU functions.

EUROPEAN COUNCIL PRESIDENT

¶6. (SBU) The Treaty creates a permanent President of the European Council (the meetings of EU heads of state and government), elected by the European Council for a period of two and a half years (renewable). This would replace the current system of six-month rotating Presidency countries. This individual may not simultaneously hold national office, and will therefore be reliant on a Brussels-based bureaucracy

to drive his activities, including the external representation of the EU. He or she will be devoted full-time to EU affairs, and become a key interlocutor for us. Nonetheless, we can expect tensions and turf battles between the President and member state leaders, and possibly between the President and the EU Foreign Minister. The success of this innovation will depend heavily on the personality of the incumbent.

17. (SBU) If improved coherence was the goal, however, another aspect of the Constitution only muddies the waters. The specialized formations of the Council (such as Transport or Agriculture, but excluding Foreign Affairs) would be chaired by ministers from pre-established teams of three member states for 18 months. These ministerial Council chairs, however, might be drawn from all three governments and would not be responsible to the new European Council President in the same way ministers currently are to their Prime Minister heading an EU Presidency. This raises some question as to whether coherence can be achieved across all formations, as well as on how we should most effectively engage with them. Nonetheless, it might mean that we will be able to better concentrate our diplomatic resources among the 25 member states, focusing especially on these teams when handling specific issues under their competency.

EU FOREIGN MINISTER AND DIPLOMATIC SERVICE

18. (U) The newly created position of EU Foreign Minister (EUFM) and the creation of a single External Action Service (EAS), are perhaps the two most highly-touted innovations in the Constitution. Boosters argue these changes would give the EU a more influential and clearer single voice on foreign affairs. The EUFM position would bring together the existing functions of CFSP High Rep (Solana) and External Relations Commissioner (Ferrero-Waldner). EU leaders have already decided Solana should be the first occupant of this job, if the Constitution is ratified. Whereas Solana at present formally has no right of initiative and very limited funds, as EU FM he would play a substantially bigger role. The EU FM would serve as a Vice-President of the Commission, giving him considerable authority over the EC's assistance budget. The EU FM would also chair the Foreign Affairs Council, making the jobholder our prime source of contact for any foreign policy issue addressed by the EU-25. A representative of the EU FM would chair the Political and Security Committee (PSC), which drives the agenda of the monthly GAERC meetings. As a result, the Brussels-based bureaucracy would become more prominent as the driving factor behind EU foreign policy.

19. (SBU) This bureaucracy would also be enhanced, as the EU FM would be able to rely on a European "external action service" that would work in cooperation with the diplomatic services of the EU Member States. The new service would comprise officials from the Secretariat-General of the Council and the Commission, as well as staff seconded from the diplomatic services of the EU Member States. Preparatory work on the European External Action Service is underway, but it could not begin operating until the Constitution enters into force. Commission delegations in non-EU countries would become EU delegations, run by the EU FM, and with the capacity to represent and engage on behalf of the EU across the whole range of CFSP and other policy areas, rather than their currently more limited mandate to concentrate on economic and regulatory matters. There is speculation that this will result over time in some member states -- especially the smaller ones -- closing their embassies in some countries, and relying on these new EU delegations to conduct their diplomatic and perhaps even consular affairs. Some EU officials point to benefits of lower costs, reduced "visa shopping" opportunities, and improved services for EU citizens abroad that might come from consolidating the EU states' current 3500 consular posts as a major selling point for the EAS.

10. (SBU) The EUFM and EAS would also take over external representation duties currently the responsibility of the foreign minister (and foreign ministry) of the Presidency country. We could well see a greater push by the EU for enhanced status in international organizations and conferences. The Constitution mentions one specific case: If the EU had a common position on a topic to be discussed by the UNSC, then EU members of the UNSC should request that the EU FM be asked to present it.

11. (SBU) It is important to note, however, that EU decisions on CFSP would still be made in almost all cases by unanimity among the member states in the Council. So, as at present, when EU members are unable to reach consensus on a foreign policy issue, the EU would have no common position. Under the Constitution's new structure, however, the EUFM would play the key role in jawboning member states toward consensus, enhancing the status of Solana -- who currently plays a more passive role, leaving the tougher work to the Presidency FM. (NOTE: A general provision in the

Constitution would allow the EU in the future to decide to move from unanimity in foreign policy issues without having to amend the Constitution. This decision, however, would have to be taken by unanimity, and could not apply to military or security policies. END NOTE.)

MORE POWERS FOR THE EUROPEAN PARLIAMENT

¶12. (U) The Constitution would apply the current "co-decision" procedure to some thirty-six new policy areas, including intellectual property, commercial policy, agricultural policy, immigration, and some aspects of police and judicial cooperation. Thus, legislation in these areas would now require approval by the EP, and would be adopted by the Member States in the Council via qualified majority vote (QMV) instead of (in many current cases) unanimity. National parliaments would also be given a six-week period to review whether all proposed EU legislation respects the "subsidiarity" principle whereby the EU should act only when "the intended action cannot be sufficiently achieved" at a lower level. If one-third of parliaments object, they could force a review of the legislation, although not block it indefinitely.

¶13. (U) Beginning in 2009, the formula for QMV will be replaced by a simpler (but still complicated) double majority system, requiring approval by 55 percent of the Member States representing at least 65 per cent of the EU's population. One effect of the latter change would be to increase the weight of big states' votes in Council. It should also be easier to get legislation in areas newly under QMV through the Council, but as these proposals will also now need national parliamentary review and EP approval, final adoption may actually be slowed.

¶14. (SBU) The EP would also gain more budgetary control, with potentially significant, but unpredictable impact on the EU's agricultural budget. This would most likely be felt only in the EU budget period beginning in 2014). In addition, EP assent would now be needed for an expanded range of international agreements signed by the EU. This would not include agreements of an exclusively foreign or security policy nature, but it would cover agreements in all areas where the "ordinary legislative procedure" is used. This has the potential to significantly constrain the EU's ability to ratify agreements in areas important to the U.S.

CHARTER ON FUNDAMENTAL RIGHTS

¶15. (C) One of the more unpredictable aspects of the Constitutional Treaty is the inclusion of the EU's Charter on Fundamental Rights in the document. This Charter was "proclaimed" at the EU Summit in Nice in December 2000, but is not at present a legally binding text. It is an expansive document including, *inter alia*, a "right to the protection of personal data" or the "right to paid maternity leave." While concepts such as these already exist in current EU legislation, this document, in our understanding, would convert them from legislative provisions into "rights" enshrined in the Constitutional Treaty. While the application of the Charter would cover only the activities of the EU institutions and national governments insofar as they are implementing EU decisions, this change could also affect either USG or US business interests. One possible area would be due to expanded application of the Charter's "double jeopardy" provision to cover proceedings in any EU member state, potentially complicating extradition proceedings.

A LEGAL PERSONALITY FOR THE UNION

¶16. (C) Contrary to the European Community (EC) and EURATOM, the EU at present does not have a legal personality. By giving the Union an explicit legal personality that will absorb that of the EC, the new Treaty would make the EU a fully recognized subject of international law. Our EU interlocutors say this should have only limited impact on third parties. It would not automatically guarantee a single representation of the EU on the external scene. EU legal experts expect the EU would simply succeed to all existing EC and EU agreements. Nonetheless, by giving the EU competence over many "justice and home affairs" (JHA) issues, a single legal personality, depending on how it is interpreted, could have a profound impact on our ability to maintain a viable bilateral-based JHA relationship with EU member states. It could constrain partners' ability to conclude various bilateral treaties embracing areas covered by EU jurisdiction, e.g., mutual legal assistance, asset sharing, etc.

COMMON SECURITY AND DEFENSE POLICY (ESDP)

¶17. (SBU) The Constitutional Treaty adds several new Articles

to the current treaties in this area. Many of the ideas proposed, however, are already being implemented. The called-for "European Armaments, Research and Military Capabilities Agency" has already been established, in the form of the European Defense Agency. The principle behind the Constitution's "solidarity clause", stating the EU and its member states shall "act jointly" to respond to a disaster or terrorist attack, has already been applied after the March 2004 Madrid train bombings. The Constitution also adds things such as disarmament operations or "military advice" to the list of "Petersberg" tasks that could be undertaken by ESDP operations. But nothing prevents current ESDP operations from undertaking such tasks either inside or outside the EU's territory, and ESDP planning is already going ahead at a rapid pace.

118. (SBU) Even the Constitution's provision for "permanent structured cooperation" allowing a subset of EU members "whose military capabilities fulfil higher criteria and which have made more binding commitments" on increasing capabilities to work together on improving capabilities for combat units is being implemented, under the EU's "battle groups" program. (NOTE: Under the current treaties, all 25 members had to agree to let this project go forward. But in any case, no current member has wanted to be left out and all have signed up to participate in some way, some offering substantial forces, others offering &niche capabilities.8 END NOTE.)

119. (U) The Constitutional Treaty rewords the current treaties assertion that ESDP "might lead to a common defense" to say that it "shall" do so, but it continues to make such a decision contingent on some future, unanimous decision by the EU member States. And it maintains the caveats that such a step shall not prejudice the "specific character" (i.e., neutrality) of certain member states, and that it shall respect and be compatible with other member states' participation in the NATO framework. The Constitution would add, for the first time, a clause (commonly referred to as the "mutual defense" clause) that says if a EU state "is the victim of armed aggression...the other Member States shall have towards it an obligation of aid and assistance by all the means in their power." But the clause goes on to include the same caveat as above for the EU's neutrals, and notes that for other EU members NATO "remains the foundation for their collective defense and the forum for its implementation."

JUSTICE AND HOME AFFAIRS

120. (C) As noted in para 10, legislation in many JHA areas would no longer be solely by unanimous decision in the Council, but would now be approved by the "ordinary legislative procedure." Traditionally, the EP, which would now vote on such legislation, has been more assertive than the Council or Commission on issues such as civil liberties, capital punishment, or drug policy. If the EP's political make-up stays the same, this could constrain the EU's ability to pass effective legislation for judicial and law enforcement cooperation. The Constitution would also lay out in more detail the principles the EU would follow in facilitating mutual recognition of judicial decision in both criminal and civil matters. These minimum rules could then have an impact on the EU's ability to cooperate with the US in such matters (perhaps analogous to existing EU concerns related to capital punishment).

121. (SBU) The Constitution would also create some new competencies in this area for the EU. One new competency (technically covered in the EU's "internal market" powers, but adopted as a means to combat terrorism) is to provide the EU an explicit legal basis for EU laws on "freezing of funds, financial assets or economic gains." The absence of such an explicit legal basis has, to date, been a significant impediment to the EU taking quick action to cut off terrorist financing. Another new competency would be to establish a "European Public Prosecutor's Office." This prosecutor would have jurisdiction "in serious crimes affecting more than one member state and of offences against the Union's financial interests" and its powers could be extended to include "serious crime having a cross-border dimension." The EU hopes that such a Prosecutor's Office would provide a much stronger basis for international judicial and law enforcement cooperation than the current Eurojust structure in The Hague.

ECONOMIC POLICY

122. (U) The major changes in economic policy under the Constitution have been discussed above, including the new role for the EP in commercial policy and agricultural policy and spending, as well as a strengthened legal basis for acting against terrorist financing. The only other provision we know of which could have a significant impact on USG interests is a new requirement for the Euro Group countries

to "establish common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences" and "to ensure unified representation" of the Euro Group within the same.

CONCLUSION

123. (SBU) While better defining the competencies of the EU and the powers of its institutions, the agreed text is not a Constitution in the full meaning of the word. It could not be further amended without unanimous consent among Member states. It remains a Treaty concluded among Member States to confer competencies to the EU, and it would not fundamentally modify the nature and powers of the Union. It would create few, if any, new policy areas for EU action. EU member states in the Council would remain at the center of EU decision-making, although with increased recourse to QMV voting and with a greater legislative role for the EP.

124. (C) Perhaps the most certain impact of the Constitutional Treaty on our relations with the EU would be that, especially on foreign policy and assistance issues, it would give us more authoritative partners with whom to deal, and relieve us of the need to constantly choreograph our contacts with both the Commission and the Council Secretariat here in Brussels, or with the Commission and the Presidency representatives elsewhere. For economic policy or JHA matters, the potential impact is less clear. In both areas we might find Council agreement easier to achieve because of increased use of QMV, and yet final approval of legislation more difficult because of new requirements for EP assent. All considered, while the Constitution would do a bit to give the EU a clearer voice on the global stage, we find the main argument of the Constitution's boosters -- that the changes to the EU proposed in the document would significantly add to EU efficiency and effectiveness -- rather oversold.

SCHNABEL

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